

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN DEMETRIS BRAGG ROSS,

Defendant-Appellant.

UNPUBLISHED

January 24, 2006

No. 258028

Kent Circuit Court

LC No. 03-004207-FC

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree, premeditated murder, MCL 750.316(1)(a), and possessing a firearm during the commission of a felony, MCL 750.227b, arising out of the shooting death of Johnny McComb in downtown Grand Rapids. Defendant was sentenced as a third habitual offender, MCL 769.11, to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's only argument on appeal is that he was denied effective assistance of counsel because his attorney failed to argue that certain evidence was admissible under MRE 803(3). We disagree.

Defense counsel sought to admit testimony from defendant's brother that before the day of his death, the victim had told him that "Chris [Hawkins] and his boys trying to kill me, they been trying to kill me." The prosecution objected on hearsay grounds, and defense counsel offered no exception to the hearsay rule. Defendant claims that the evidence was admissible under MRE 803(3) as the victim's then existing state of mind and that counsel was ineffective for failing to argue for its admission under that rule.

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law that is reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States

Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

With respect to counsel’s performance and whether it was deficient, the performance is measured against an objective standard of reasonableness with consideration of the circumstances and prevailing professional norms. *Pickens*, *supra* at 303, 327. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

MRE 803(3) provides an exception to the hearsay rule with respect to the following kinds of statements:

A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.

The statement at issue in the present case falls directly into the latter portion of MRE 803(3). At the time the victim spoke, he believed that Hawkins, through his associates or acquaintances, was trying to kill him based on past events, and the statement was offered to show that Hawkins wanted the victim killed. The statement was inadmissible based on the plain language of MRE 803(3); it was a statement of belief sought to be used to prove the fact believed. See *People v Moorner*, 262 Mich App 64, 73; 683 NW2d 736 (2004). Therefore, counsel was not ineffective for failing to argue for admission under MRE 803(3) because such an argument would have been futile, and counsel is not required to argue a meritless position. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Additionally, defendant cannot establish that he was prejudiced as a result of counsel’s inaction, assuming deficient performance. In the present case, the admission of the evidence would have had no effect on the outcome of the trial. There was evidence that defendant discussed murdering the victim, hired someone to do it, and that said person failed to follow through. There was further testimony that defendant was with the victim immediately before the murder occurred and that defendant was seen running from the alley where the murder took

place immediately after the shots were fired. There was testimony that defendant had a motive for the murder and that defendant was wearing clothes that matched the description of the perpetrator. There was also testimony that the victim was shot with a .380 caliber weapon and that defendant owned a .380 weapon and had planned to use it for the murder. On the basis of all of this evidence, it is clear that other evidence suggesting that someone else wanted the victim dead would not have changed the outcome as there was ample evidence to link defendant to the crime.

Affirmed.

/s/ Brian K. Zahra

/s/ William B. Murphy

/s/ Janet T. Neff